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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

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No. 77-926

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GERALDINE G. CANNON,  
v. *Petitioner,*

THE UNIVERSITY OF CHICAGO, et al.,  
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals  
for the Seventh Circuit**

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**MOTION TO SUBMIT BRIEF AS *AMICUS CURIAE*  
AND BRIEF FOR THE EQUAL EMPLOYMENT  
ADVISORY COUNCIL AS *AMICUS CURIAE***

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**MOTION OF THE EQUAL EMPLOYMENT  
ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF  
AS *AMICUS CURIAE***

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To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") moves this Court for leave to file the accompanying brief as *Amicus Curiae* supporting the respondents, The University of Chicago, et al, in this case. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary non-profit association organized as a corporation under the laws of the District of Columbia to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies and procedures to ensure nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

2. Although most of EEAC's members are not directly subject to the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, the Court's decision in this case—determining whether or not Title IX provides a private individual right to sue—can be expected to bear importantly on employers subject to other similar statutory provisions. Thus, many of EEAC's members participate in federally subsidized programs of various types and therefore are subject to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. V 1975), a statute, which, like Title IX, was modeled after Title VI of the Civil Rights Act of 1974, 42 U.S.C. § 2000d, *et seq.* Furthermore, most of EEAC's members are also federal contractors subject to Section 503 of the

Rehabilitation Act, 29 U.S.C. § 793 (Supp. V 1975), a differently worded affirmative action statute for qualified handicapped workers which does not use the term "discrimination" and which expressly provides for an administrative remedy for noncompliance. EEAC's brief, set forth below, examines the issues presented in this Title IX case in their own legislative and statutory context, and further discusses the potential implications of this case for issues arising under the Rehabilitation Act.

3. For several reasons, EEAC feels it is important for this Court to be apprised of the relationship between the analogous implications of issues under Section 504 of the Rehabilitation Act (also modeled after Title VI to some degree) and this Title IX case:

The petitioner cited the similarity of language of three statutes, Title IX ("No person . . . shall be excluded"), Title VI ("No person shall be denied . . ."), and Section 504 ("No otherwise qualified handicapped individual . . . shall be excluded"), to establish the public importance of the private right of action issue as a reason for this Court to take certiorari jurisdiction over this case. (Cert. Pet. at 5) The Petitioner's brief cites a Section 504 case, *Lloyd v. RTA*, 548 F.2d 1277 (7th Cir. 1977), which was decided before the Department of Health, Education and Welfare had issued regulations under Section 504, in support of her argument that this Court should create a judicial remedy for injunctive relief and damages for unsuccessful student applicants, in addition to the administrative remedy provided by HEW's Title IX regulations and the available judicial review of HEW determinations. (Brief for

Pet. at 7 note 4) Petitioner admitted that there now exist identical enforcement provisions for Title IX and Section 504: both sets of HEW regulations "incorporate by reference the enforcement provisions for Title VI. 45 C.F.R. § 84.61 and 45 C.F.R. § 86.71." (*Id.*)

In addition, the *amicus* brief submitted in support of petitioner by the federally funded National Center for Law and the Handicapped, Inc. ("NCLH"), deals primarily with Section 504 issues. Both petitioner and respondents consented to the filing of that brief. (See NCLH Brief at 4).

Because petitioner relies on *Lloyd*, and because four members of this Court referred to *Lloyd* in the context of the discussion of Title VI in *Regents v. Bakke*, — U.S. —, 98 S.Ct. 2733, 2815 n. 27 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part), the EEAC believes that a fuller discussion of relevant Section 504 implication issues will be helpful to the Court in this case.

4. As set forth more fully in the accompanying brief, EEAC submits that neither Title IX or Section 504 provides a private judicial remedy; but should this Court imply any sort of nonstatutory remedy for an unsuccessful graduate school applicant under Title IX, the holding should be expressly limited to the facts of this case, to avoid opening the door to a barrage of lawsuits by rejected job applicants and employees under Title IX, Title VI, and Section 504. EEAC members are especially concerned that employers subject to comprehensive federal regulation under numerous statutes and executive orders (including universities in their capacities

as employers) not be suddenly confronted with massive potential liabilities in court actions lacking explicit Congressional authorization.

5. On several other occasions, EEAC sought and was granted permission by this Court to file briefs as *Amicus Curiae*. See, e.g., *Furnco Construction Corp. v. Waters*, — U.S. —, 46 U.S.L.W. 4966 (1978); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Gardner v. Westinghouse Broadcasting Company*, 46 U.S.L.W. 4761 (1978); and *Shell Oil Company v. Anne M. Dartt*, 434 U.S. 98 (1977).

6. The written consent of counsel for the respondents to the filing of this brief has been filed with the Clerk of the Court. Counsel for the petitioner indicated that he would not consent, thereby necessitating this motion.

WHEREFORE, it is respectfully moved that the EEAC be granted leave to file the accompanying brief *Amicus Curiae* in this case.

Respectfully submitted,

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**BRIEF FOR THE EQUAL EMPLOYMENT  
ADVISORY COUNCIL AS *AMICUS CURIAE***

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The Equal Employment Advisory Council ("EEAC") respectfully submits this brief *amicus curiae* in support of the Respondents, The University of Chicago, *et al.*

**SUMMARY OF ARGUMENT**

Title IX expressly provides for judicial review of administrative action in a suit against the agency. No additional judicial remedies should be implied by the courts, because the intent of Congress to preclude additional remedies is apparent from the carefully constructed remedial scheme of the statute. The leg-

islative history of Section 504 leads to the conclusion that access to court under both statutes is restricted to those who have obtained an adverse administrative ruling. An allegation in the complaint that a "personal civil right" is involved does not justify ignoring the procedures specified by Congress for vindicating that right.

If a right of action were implied under Section 504, the number of potential plaintiffs could be enormous and could include an indiscernible number of persons not presently defined in the statute. Although not all citizens are in fact handicapped individuals who are qualified for particular programs or jobs, many allegations to that effect would be likely to survive a motion to dismiss and necessitate voluminous discovery and lengthy trials. See, e.g., *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The *Amicus Curiae* believes that such a staggering judicial expansion of federal jurisdiction must be precluded by a properly limited construction of the language which appears in both Title IX and Section 504.

If any nonstatutory right of action against private universities were implied from Title IX, it should be carefully limited to declaratory and injunctive relief subsequent to exhaustion of administrative remedies. Monetary remedies should not be available. The scope of the action should be limited to the particular programs receiving federal funds, and not allowed to encompass every activity of the entity which participates in the subsidized program. In particular, employment activities other than federally subsidized jobs programs are beyond the scope of Title IX or Section 504.

## ARGUMENT

### I. The Court should not imply an additional private judicial remedy under Title IX.

#### A. *Nothing in the legislative history of the Rehabilitation Act supports the implication of a right of action against private entities under Section 504 of that Act or under Title IX, but much supports the restriction of judicial participation in enforcement to a limited review of administrative proceedings in suits against the agency.*

The portions of Section 504's legislative history that were quoted extensively in *Lloyd v. RTA*, 548 F.2d 1277, 1285-86 (7th Cir. 1977), and mentioned in Mr. Justice Stevens' opinion in *Bakke*, 98 S.Ct. at 2815 n. 7, show that Congress intended the enforcement provisions for Section 504 to be patterned after the Title VI regulations, 45 C.F.R. Parts 80 and 81, which do not provide for or contemplate a private cause of action for alleged victims of discrimination against alleged violators. Senate Report No. 93-1297<sup>1</sup> includes the following sentence:

This approach to implementation of section 504, which closely follows the models of [Title VI and Title IX], would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of

<sup>1</sup> 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6791. This report is dated November 26, 1974. Proposed Title IX regulations had been published five months earlier, on June 20, 1974, 39 Fed. Reg. 22228, but were not issued in final form until June 4, 1975. 40 Fed. Reg. 24137.

implementation, and permit a judicial remedy through a private action.

Petitioner cites this last phrase and the *Lloyd* case in support of her argument that she may bypass Title IX's administrative procedures and sue a recipient of federal funds directly. But the *Lloyd* court expressly stated that "the above language contemplates judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court," 548 F.2d at 1248. The entire passage from the Senate Report is a directive to the Department of Health, Education and Welfare to enforce Section 504 as it was already enforcing Title VI and Title IX. If HEW should arbitrarily and capriciously abuse its enforcement powers, an aggrieved recipient of federal financial assistance would clearly be entitled to obtain judicial review of agency action, the "judicial remedy through a private action" contemplated by Congress. The defendant in such an action would be HEW, not the recipient of federal funds,<sup>2</sup> and review would be limited to the administrative record, to determine whether the agency's action was arbitrary or capricious or unsupportable by substantial evidence on the record

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<sup>2</sup> The Administrative Procedure Act, 5 U.S.C. §§ 701-706, providing for judicial review of agency action, allows suits against agencies but not private parties. See, e.g., *Thomas v. DeVilbiss*, 408 F. Supp. 1357 (D. Ariz. 1973). Thus, persons alleging a failure of an agency to eradicate discrimination by the regulated entities must file suit against the agency, as in *NAACP v. Federal Power Comm.*, 425 U.S. 662 (1976), not against the regulatee. The courts have long recognized the "merit in confining [Title VI] litigation to the public agencies." *Taylor v. Cohen*, 405 F.2d 277, 283 (4th Cir. 1968).

as a whole. See *Camp v. Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

Petitioner's seizure upon this sole passage from the legislative history of Section 504 to buttress her argument that a private cause of action should be implied under Title IX highlights her complete inability to point to any evidence in Section 504's history of a Congressional intent to provide for the type of private suit for damages and injunctive relief against a private university which petitioner seeks to maintain under Title IX. That very passage, as the *Lloyd* panel recognized, though it pretermitted the issue as premature, can be read in no other way than to restrict the scope of judicial participation in Section 504 enforcement to a limited review of administrative proceedings. In other words, Congress intended to foreclose private litigation about alleged discrimination by educational institutions that participate in one or more federally subsidized programs until a final agency determination has been made. Because administrative procedures had not yet been established when *Lloyd* was handed down, the court allowed the suit to proceed against public transportation authorities whose actions otherwise would not have been reviewed by any tribunal, administrative or judicial. In contrast, the availability of both administrative review and limited judicial review of agency action under Title IX, 20 U.S.C. §§ 1682, 1683, precludes the implication of an additional private cause of action against the University of Chicago, particularly one for damages.

An intention to preclude such private suits must be deduced from the terms of Title IX itself according to the principle of statutory construction followed in *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974) (hereinafter "*Amtrak*"), that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." Title IX expressly provides for administrative enforcement and limited judicial review, 20 U.S.C. §§ 1682, 1683. Although Section 504 of the Rehabilitation Act does not include similar provisions, the very portion of the legislative history of Section 504 upon which petitioner relies contemplates the issuance of regulations like those under Title IX and Title VI. Because the Congressional directive for Section 504 is "mandatory in form, and such regulations and enforcement are intended,"<sup>3</sup> Congress clearly did not intend to permit private suits against the recipients of federal funds.

As Mr. Justice Powell pointed out in *Bakke*,<sup>4</sup> there are clear indications in Title VI's legislative history that Congress did not intend to create a private cause of action under that statute. Congress did not find it necessary to say more than it did in the legislative histories of Title VI and Title IX about its intention to foreclose additional judicial remedies because that intention is so plain from the provisions of both Titles that expressly provide particular ju-

<sup>3</sup> S. Rep. No. 93-1297, 93d Cong., 2d Sess., reprinted in [1974] U.S. CONG. CODE CONG. & AD. NEWS at 6390-91.

<sup>4</sup> *Bakke*, 98 S.Ct. at 2745 n. 18.

dicial and administrative remedies, but omit from those remedies any rights for private individuals to sue recipients of federal funds.<sup>5</sup> Similarly, the most plausible explanation for the lack of more detailed language foreclosing a judicial cause of action under Section 504 lies in the directive of Congress to HEW, in the Senate Report cited by the *Lloyd* court,<sup>6</sup> to enforce Section 504 just as it had been enforcing Title IX and Title VI. Congress, which is surely aware of the long-standing<sup>7</sup> principle of statutory construction restated in *Amtrak*, is entitled to assume that the judiciary will recognize the "balance, completeness, and structural integrity" of its statutes and abstain from interference with the "careful blend of administrative and judicial enforcement powers"<sup>8</sup> contained in Title VI and in Title IX and incorporated by reference (in the Senate Report) into Section 504. This Court has never demanded that Congress insert into a statute or its legislative history a sentence to the effect that "no court shall imply any additional remedies hereunder" as a precondition to its refusal to "expand the coverage of the statute to subsume other remedies."<sup>9</sup>

<sup>5</sup> "When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning." *Tennessee Valley Auth. v. Hill*, — U.S. —, 98 S.Ct. 2279, 2296 n. 29 (1978).

<sup>6</sup> [1974] U.S. CODE CONG. & AD. NEWS at 6390-91.

<sup>7</sup> See, e.g., *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929), the case cited in *Amtrak*.

<sup>8</sup> See *Brown v. GSA*, 425 U.S. 820, 832-33 (1976).

<sup>9</sup> *Amtrak*, *supra*, 414 U.S. at 458.

Even if legislative history were ambiguous about the intent of Congress to foreclose a private cause of action, the lack of evidence of an intent to create one, combined with provision of alternative remedies, should settle the issue against implication. However, the exact nature of the legislative history prong of the implication test announced in *Cort v. Ash*, 422 U.S. 66, 78 (1975), is unclear after the *Bakke* decision. Prior to *Bakke*, one could reasonably have assumed, as did the Fifth Circuit in *Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 360 (5th Cir. 1977) (rejecting private cause of action under HUD Handbook and National Housing Act),<sup>10</sup> that legislative silence on the private right of action issue was a strike against implication. If legislative silence or ambiguity is read the opposite way, as supporting the notion that Congress had no intention to foreclose a private right of action, then such decisions as *Cort* and *Amtrak* and *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975), would have to be overruled. The courts would be obliged to entertain an explosion of lawsuits in geometric proportion to the enormous growth of federal statutes and regulations. The better approach is to leave such an expansion of federal court jurisdiction to the explicit wisdom of Congress.

A recent student note and a student comment<sup>11</sup>

<sup>10</sup> In *Roberts* the Court required that there "be some indication of legislative intent to create such a remedy" before a private cause of action would be implied from a statute. *Id.* at 360.

<sup>11</sup> Note, "Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View," 87 Yale L.J. 1378 (1978);

attempt to distinguish *Cort*, *Amtrak*, and *Barbour* as non-civil rights cases, and suggest that private rights of action ought to be inferred under civil rights statutes as a matter of course. Such a simplistic approach would merely encourage artful attempts to characterize nearly every claim as a "civil right" in order to gain access to federal court. Most substantive rights created by federal statutes, including those created by the statutes in *Cort*, *Amtrak*, and *Barbour*, can easily be conceptualized as personal civil rights. Legal fictions aside, all statutory duties ultimately impinge on persons, and all statutory rights accrue to persons. Nonetheless, the sound principles of separation of powers which underlie this Court's refusals to interfere with Congressional legislative schemes by implying remedies Congress did not see fit to provide apply just as strongly to federal statutes which a plaintiff thinks create a "civil right" as to any other federal statutes.

Two of this Court's recent decisions reject the argument that federal courts must automatically hear alleged civil rights claims regardless of the lack of Congressional intention to create jurisdiction over the particular type of claim alleged. In *Morris v. Gressette*, 432 U.S. 491 (1977), the Court held that the Attorney General's failure to object to a reapportionment plan under § 5 of the Voting Rights Act is not subject to judicial review, despite the fact

Comment, "Private Rights of Action under Title IX," 1978 Harv. Civ. R.-Civ. Lib. L. Rev. (page proofs not yet available). Neither the note nor the comment even mentions the two cases which refute their thesis, *Morris v. Gressette*, 432 U.S. 491 (1977), and *Santa Clara Pueblo v. Martinez*, — U.S. —, 98 S.Ct. 1970 (1978), discussed *infra*.

that "no provision of the Voting Rights Act expressly precludes judicial review," *id.* at 501, and "there is no legislative history bearing directly on the issue," *id.* at 503, because "nonreviewability can fairly be inferred" within "the context of the entire legislative scheme." *Id.* at 501. This is the very portion of the Voting Rights Act under which a certain type of private cause of action had been inferred in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), a case relied on by petitioner and her supporting *amici*.

Likewise, in *Santa Clara Pueblo v. Martinez*, — U.S. —, 98 S.Ct. 1970 (1978), this Court declined to imply a private cause of action for sex and ancestry discrimination under Title I of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1970), which declares in broad language establishing personal rights that no Indian tribe "in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*, § 1302(8). The Court's dispositive citation of *Amtrak* and *Cort* in the *Santa Clara Pueblo* case, 98 S.Ct. at 1670, obviously rejects the suggestion that the rationales and results of *Amtrak* and *Cort* apply only to non-civil rights cases. *Santa Clara Pueblo* also rebuffs the strange argument of the *amici* supporting petitioner to the effect that alleged personal rights of single individuals are somehow entitled to greater judicial solicitude at the threshold jurisdictional level than "public" rights of many persons being enforced collectively by an executive officer.

Thus, though this case involves an alleged "personal civil right" to be admitted to the medical school

of the University of Chicago, the concerns for judicial restraint which led to the *Cort*, *Amtrak*, and *Barbour* decisions likewise bar Ms. Cannon's attempt to sue the University of Chicago directly, rather than to await an HEW decision and, if it is adverse, to seek judicial review.

***B. Implication of a private right of action under Title IX would interfere with the legislative purposes of the Education Amendments of 1972.***

Petitioner takes the extreme position that because private suits will have the effect of eliminating discrimination, such suits must be consonant with the legislative purpose of Title IX. To make this argument, petitioner must redefine the legislative purpose in the abstract, without reference to the other portions of the Education Amendments of 1972 or even to the other portions of Title IX, particularly the means Congress designated in 20 U.S.C. § 1682 and § 1683 to implement § 1681.<sup>12</sup>

<sup>12</sup> It is somewhat misleading to insist or assume that female applicants to graduate schools participating in one or more subsidized programs are the intended beneficiaries of Title IX or that otherwise qualified handicapped individuals seeking to participate in a subsidized program are the intended beneficiaries of Section 504. Congress obviously had such groups in mind when it passed those statutes. But Congress bestowed a limited benefit upon them. The benefit explicitly conferred does not include the right for a disappointed student or a qualified handicapped individual to sue the recipient of federal funds. The benefit is limited to whatever the designated enforcement agency obtains on their behalf. Thus, the part of the *Cort v. Ash* test which inquires whether the plaintiff is a person for whose especial benefit the statute was passed must include consideration of the nature of the special benefit, if any, which has explicitly been provided. Petitioner merely begs this question when she states that she

It is important to view Title IX within "the context of the entire legislative scheme"<sup>13</sup> of the Education Amendments of 1972.<sup>14</sup> The purpose of the statute, an extensive piece of legislation occupying nearly 200 pages of the U.S. Code Congressional and Administrative News, was to improve the American education system by providing a massive infusion of federal funds into a myriad of programs, especially in higher education, and to produce the best graduates possible as a result of the federal expenditures. Because sex discrimination arbitrarily and irrationally eliminates some better qualified persons who happen to be female from the student rolls, it was prohibited insofar as the funded programs were concerned. However, the Amendments were primarily an appropriations law,<sup>15</sup> and the major task assigned to the Department of Health, Education and Welfare, the federal agency with educational expertise, was to see that the appropriated

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is "within the class for whose *especial* benefit Title IX was enacted." (Cert. Pet. at 12) *See, e.g., United States v. Lovknit Mfg. Co.*, 189 F.2d 454 (5th Cir.), *cert. denied*, 432 U.S. 896 (1951) (no implied private right for employee to sue federal contractor for failure to comply with wage-hour provisions of Walsh-Healey Act, 41 U.S.C. §§ 35-45, because action by Attorney General to recover underpaid amounts on behalf of employees is the only relief Congress provided).

<sup>13</sup> *Morris v. Gressette*, *supra*, 432 U.S. at 501, citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

<sup>14</sup> Public Law 92-318, 86 Stat. 235, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 278.

<sup>15</sup> Likewise, the Rehabilitation Act of 1973 was primarily a spending bill to develop new programs to assist the handicapped.

funds were spent for the intended purposes. To accomplish that task, HEW was to ensure that educational standards would be maintained and, it was hoped, at the same time, to make certain that the standards were not used to exclude female applicants to graduate schools because of their sex. Thus, the enforcement of Title IX was committed not to the federal courts but to HEW, which Congress presumed to have the expertise to remove any inherent sexual bias from scholastic standards for graduate school admissions, grading, and other practices without impairing valid educational requirements or impinging on academic freedoms.<sup>16</sup>

The Court must consider not only the Education Amendments of 1972 as a whole, but also Title IX as a whole, instead of focusing only on § 1681. The carefully constructed legislative scheme of Title IX is to attack sex discrimination in the distribution of federal funds through certain administrative and judicial procedures. The argument that Congress intended to root out sex discrimination by any and all conceivable means not only is belied by the bal-

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<sup>16</sup> The relative lack of expertise in the courts for weighing academic qualifications or performance has been noted in the related context of employment discrimination cases involving faculty members brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which provides an express private remedy. *See e.g., Green v. Board of Regents of Texas Tech Univ.*, 335 F. Supp. 249 (N.D. Tex. 1971), *aff'd*, 474 F.2d 594 (5th Cir. 1973); *Faro v. New York Univ.*, 502 F.2d 1229, 1231-2 (2d Cir. 1974) ("Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision").

ance, completeness, and structural integrity of Title IX, but also would compel the conclusion that there is an implied private right of action under every obligatory or prohibitory federal statute. That argument flies in the face of this Court's decisions in *Amtrak*, *Cort*, *Barbour*, *Morris*, and *Santa Clara Pueblo*, *supra*.

The Seventh Circuit below captured the essence of the fallacy in petitioner's argument by observing:

Such an argument goes too far, for implication of a private right to enforce every federal statute would have the same effect of assisting agency efforts to obtain compliance with federal policies. Simply put, the argument begs the question of whether implication of a private judicial remedy is consistent with the purposes of a legislative scheme that gives responsibility for enforcing its statutory policies to an administrative agency rather than to "private attorneys general." We think it clear from the face of the statute and the regulations promulgated pursuant thereto that, in providing private parties with an administrative but not a judicial forum in which to raise complaints of sex discrimination, it was Congress's purpose to commit the screening of Title IX complaints to the administrative agencies charged with the responsibility of overseeing federally funded educational programs and to encourage resolution of those complaints by means of agency conciliation efforts directed at achieving voluntary compliance with the statutory prohibition. Those purposes would not be served by implying a statutory cause of action that would permit private parties to circumvent the remedial scheme created by Congress.

599 F.2d at 1081.

The legislative purpose of Section 504 is likewise better served by agency enforcement (and judicial review of agency action) than by private suits. "Handicap discrimination" is a relatively new concept whose meaning is still unclear not only to those being accused of it, but also to the agency charged with rooting it out of various federally subsidized programs." Former HEW Secretary Mathews explained the unique definitional problems in this area in a letter accompanying the publication of the initial version of the proposed Section 504 regulations:

Section 504 [of the Rehabilitation Act of 1973, 29 U.S.C. § 794], however, differs conceptually from both titles VI [of the Civil Rights Act of 1964] and IX [of the Education Amendments of 1972]. The premise of both title VI and title IX is that there are no inherent differences or inequalities between the general public and the persons protected by these statutes and, therefore, there should be no differential treatment in the administration of Federal programs. The concept of section 504, on the other hand, is far more complex. Handicapped persons may require different treatment in order to be afforded equal

<sup>17</sup> The confusion was so troubling that on January 18, 1977, former HEW Secretary Mathews declined to sign the proposed § 504 regulations drafted by his agency and instead sent them back to Congress under cover of a letter to Congressman John Brademas which complained of "difficulty of reconstructing the intent of Congress," especially with respect to coverage of drug addicts and alcoholics. Secretary Califano signed the regulations, however, on April 28, 1977. *Cf. Florey v. Line Pilots Assoc., Int.*, 439 F. Supp. 165, 172 (D. Minn. 1977) (rejecting private cause of action for alcoholics).

access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination. The problem of establishing general rules as to when different treatment is prohibited or required is compounded by the diversity of existing handicaps and the differing degree to which particular persons may be affected. Thus, under section 504 questions arise as to when different treatment of handicapped persons should be considered improper and when it should be required.<sup>18</sup>

Not only is the limited prohibition of handicap discrimination against "otherwise qualified" individuals new, but the very substantive concept is novel and raises difficult problems of application. Handicaps differ widely in kind and degree, and there is no readily identifiable and homogeneous class of handicapped persons. Nor is there a class of non-handicapped persons with whom treatment of handicapped persons can be compared. The Rehabilitation Act's definition of the handicapped, 29 U.S.C. § 701(6) (Supp. V 1975), is so broad that discrimination would have to be defined in terms of disparate treatment of differently and uniquely handicapped individuals. This analysis becomes hopelessly complex because there is no fixed reference class with which treatment of others can be compared.

Notwithstanding that Congress chose to use the same term "discrimination" which has proven effective in the social assault on racism and sexism, the very fact that Congress limited the application of Section 504 to "otherwise qualified handicapped indi-

<sup>18</sup> 41 Fed. Reg. at 20,296 (1976).

viduals" who face disparate treatment "solely" on the basis of handicap shows the caution of Congress in this new area. Furthermore, Congress has consistently rejected the perennial attempts to amend Title VII, which does include an explicit private right of action, 42 U.S.C. § 2000e-5(g), to add handicap as a prohibited ground of discrimination.<sup>19</sup> The only reasonable inference from the face of the Rehabilitation Act and its legislative history is that Congress, in its initial foray into an uncharted field, declined to provide private rights of action because it wanted a specialized agency to explore the field to determine which efforts to improve the opportunities for handicapped individuals are most appropriate.<sup>20</sup>

<sup>19</sup> See Exhibit "A" hereto, and *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200 (N.D. Tex. 1977), *appeal pending*, No. 77-2443 (5th Cir.) (no implied private right of action under Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which does not use the term "discrimination" but merely requires federal contractors to take affirmative action to employ and advance in employment qualified handicapped individuals). Accord, *Wood v. Diamond State Telephone Co.*, 440 F. Supp. 1003 (D. Del. 1977); *Moon v. Roadway Express*, 439 F. Supp. 1308 (N.D. Ga. 1977), *appeal pending*, No. 77-3263 (5th Cir.). Employment issues are discussed in more detail in Section III(A) of this brief, *infra*.

<sup>20</sup> At the very least, the legislative purposes of both Section 504 and Title IX require resort to administrative remedies prior to the filing of any court action. Thus, the courts have often dismissed Title VI suits for failure to exhaust administrative remedies. See, e.g., *Green Street Ass'n v. Daley*, 373 F.2d 1, 8-9 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967); *Green v. Cauthen*, 379 F. Supp. 361, 378 (D.S.C. 1974); *Feliciano v. Romney*, 363 F. Supp. 656, 672-73 (S.D.N.Y. 1973); *Dupree v. City of Chattanooga*, 362 F. Supp. 1136, 1141-42 (E.D. Tenn. 1973). Since HEW's administrative

**II. Any implied judicial remedy under Title IX should be carefully circumscribed.**

**A. Title IX covers only the programs receiving federal financial assistance, not every activity administered by the institution participating in the subsidized program.**

Title VI, the statute at issue in *Lau v. Nichols*, 414 U.S. 563 (1974), explicitly excludes employment practices of recipients of federal grants from coverage except in federally-subsidized jobs programs. 42 U.S.C. § 2000d-3 (1970); see *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 882-83 (5th Cir. 1966), *decree corrected on rehearing*, 380 F.2d 385 (en banc), *cert. denied*, 389 U.S. 840 (1967). Nonetheless, the Department of Health, Education and Welfare has taken the position that it has jurisdiction under Title IX and Section 504 not only over programs receiving federal aid, but also all other activities, including employment practices unrelated to the federally assisted activity. 45 C.F.R. §§ 86.51-86.61 (Title IX); 45 C.F.R. §§ 84.11-84.14 (Section 504).

Five federal district courts, after exhaustive analyses of legislative history, have now held that Title IX, like Title VI, only reaches discrimination affecting the direct beneficiaries of federal assistance and does not cover collateral employment practices, and that HEW lacked authority to issue the regulations purporting to deal with employment practices. *Brunswick School Board v. Califano*, 449 F.Supp. 866 (D.

remedies under Title IX are identical to those of Title VI, the same principle requires dismissal of the present action. See Section III(C), *infra*.

Me. 1978); *Romeo Community Schools v. HEW*, 438 F.Supp. 1021 (E.D. Mich. 1977), *appeal pending*, No. 77-1691 (6th Cir.); *Seattle University v. HEW*, — F.Supp. —, 16 E.P.D. ¶ 8241 (W.D. Wash. 1978); *McCarthy v. Burkholder*, 448 F.Supp. 41 (D. Kan. 1978); *Junior College District of St. Louis v. Califano*, 18 F.E.P. Cases 88 (E.D. Mo. 1978). See Kuhn, "Title IX: Employment and Athletics are Outside HEW's Jurisdiction," 65 Geo. L.J. 49 (1976).

Likewise, the legislative history of Section 504 reveals that this statute was not intended by Congress to cover employment practices other than federally funded job programs. Section 504 was added to the Rehabilitation Act because of the failure of proposed amendments to Title VI to add coverage for the handicapped.<sup>21</sup> Congressman Vanik stated that the purpose of the rejected Title VI amendments was to cover education and vocational training,<sup>22</sup> and later indicated his satisfaction that Section 504 had incorporated his proposal.<sup>23</sup> Thus, the only impact Section 504 was to have on employment was in the area of subsidized vocational training. See Note, "Equal Employment of the Disabled: A Proposal," 10 Colum. J.L. & Soc. Prob. 457, 468 (1974).

The Equal Employment Advisory Council submits that if any sort of private right of action is implied

<sup>21</sup> H.R. 12,154, 92d Cong., 1st Sess. (1971); H.R. 13,947, 92 Cong., 2d Sess. (1972).

<sup>22</sup> See, e.g., 117 Cong. Rec. 45,974 (1971) (remarks of Representative Vanik).

<sup>23</sup> 119 Cong. Rec. H4,294 (daily ed. June 5, 1973) (remarks of Representative Vanik).

for unsuccessful students under Title IX, the exact nature and scope of the implied remedy should be carefully circumscribed. The Court should make it plain that Title IX covers only the specific programs receiving federal aid, not other activities of institutions which administer the subsidized program.

Regulation of one such other activity, employment practices, is an area in which the courts have been particularly adverse to the implication of private judicial remedies under federal statutes and executive orders.<sup>24</sup> The prospect of judicially created employ-

<sup>24</sup> See, e.g., the cases collected in *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200, 202 n. 1 (N.D. Tex. 1977) (no private right of action under Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793). Cases denying implication of private causes of action for employees under various federal statutes include *Olson v. Shell Oil Co.*, 561 F.2d 1178 (5th Cir. 1977) (Outer Continental Shelf Lands Act); *Marshall v. Daniels Constr. Co.*, 563 F.2d 707 (5th Cir. 1977), cert. denied, 47 U.S.L.W. 3210 (1978) (Secretary of Labor may not enforce an alleged implied private right under Occupational Health and Safety Act of 1970 for employee to refuse to work when confronted with dangerous condition); *Jeter v. St. Regis Paper Co.*, 507 F.2d 973 (5th Cir. 1975) (Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678); *Martinez v. Behring's Bearings Serv., Inc.*, 501 F.2d 104 (5th Cir. 1974) [antidiscrimination provisions of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3)]; *Flores v. George Braun Packing Co.*, 482 F.2d 279 (5th Cir. 1973) [Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(A)(ii), 1182(a)(14), 1324]; *Chavez v. Freshpict Foods, Inc.*, 456 F.2d 890 (10th Cir.), cert. denied, 409 U.S. 1042 (1972) (same); *Hines v. Cenla Community Action Comm., Inc.*, 474 F.2d 1052 (5th Cir. 1973) (Economic Opportunity Act, 42 U.S.C. § 2796); *Breitwieser v. KMS Indus., Inc.*, 467 F.2d 1391 (5th Cir. 1972), cert. denied, 410 U.S. 969 (1973) (child labor provisions of Fair Labor Standards Act, 29 U.S.C. § 212); *Farkas*

ment litigation under the Rehabilitation Act is particularly unappealing. Such litigation would present, in the words of the court in *Lloyd v. RTA, supra*, 548 F.2d at 1286, "the unseemly vista of a spotty application of *ad hoc* remedies in lawsuits in various regions of the country." Private lawsuits for reinstatement and back pay against private employers, whether or not alleged as class actions,<sup>25</sup> would necessitate numerous individual determinations concerning degree of handicap and ability to perform particular jobs efficiently. Because handicaps, unlike most other potential grounds for discrimination, "differ widely in nature and degree of severity," 41 Fed. Reg. 29,548 (1976), alleged class actions would lack common, predominant questions of fact or law, would include atypical and potentially conflicting claims, would not provide a superior method of adjudication of all claims, and would be inherently unmanageable. See Fed. R. Civ. P. 23(a), 23(b)(3).<sup>26</sup> It is no wonder

*v. Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir.), cert. denied, 389 U.S. 977 (1967) (Exec. Order No. 10,925, the predecessor of Exec. Order No. 11,246); *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3, 8 (3d Cir. 1964), (same); *United States v. Lovknit Mfg. Co.*, 189 F.2d 454 (5th Cir. 1951) (Walsh-Healey Act, 41 U.S.C. §§ 35-45).

<sup>25</sup> The implication issue should not turn on whether or not a class action is alleged. A rule allowing class actions but not individual ones would encourage the inclusion of frivolous class allegations in every complaint.

<sup>26</sup> In *Webb v. Miami Valley Regional Transit Auth.*, Civil Action No. C-3-75-67 (S.D. Ohio, dismissed Jan. 19, 1976), the court held that the alleged class of handicapped and elderly persons was "so nebulous and so diverse as to defy attempts to ascertain its limits. As such, this Court cannot

that Congress has repeatedly refused to amend Title VII to add handicap as an additional prohibited ground of discrimination.<sup>27</sup>

**B. There is no private right to sue for monetary damages.**

The petitioner's prayer for monetary damages in her complaint raises the additional issue, which must be reached only if an additional nonstatutory remedy is implied under Title IX, of whether the remedy includes, for example, damages for loss of income or mental distress or (in the employment context) back pay.<sup>28</sup> Even if some private cause of action were implied under either Title IX or Section 504, monetary

find that there are questions of law or fact common to the class or that the claims or defenses of the representative parties are typical of the claims or defenses of the class."

<sup>27</sup> See Exhibit "A" to this brief. In the Age Discrimination Act, in which Congress explicitly provided for private suits, Congress also recognized the individualized nature of the determinations to be made thereunder, and placed a severe restriction on the scope of multi-plaintiff actions by the "opt-in" provision in the Act. 29 U.S.C. § 626(b) (1970); see Note, The Age Discrimination in Employment Act of 1967, 90 Harv. L. Rev. 380, 381 n. 10 (1976).

<sup>28</sup> The petitioner in the *Bakke* case (Title VI) sought only declaratory and injunctive relief, not damages. Likewise, *Lloyd v. RTA* (Section 504) allowed a suit only for declaratory and injunctive relief against a public transportation authority, in the absence of administrative procedures to seek review of the authority's actions.

The court held in *Rendon v. Utah Job Service*, 17 F.E.P. Cases 1250 (D. Utah 1978), that monetary damages are not available under Title VI. The Eighth Circuit pretermitted the issue in *Chambers v. Omaha Public School Dist.*, 536 F.2d 222, 225 n. 2 (8th Cir. 1976).

remedies should not be provided. The legislative history of neither Title IX nor Section 504 gives any support whatsoever to the notion that monetary remedies should be available to private litigants against institutions which participate in federally funded programs. To the contrary, the repeated refusals of Congress to amend Title VII to cover the handicapped evince an intent to preclude such remedies under Section 504. Because Congress has consistently refused to extend to qualified handicapped individuals the back pay remedies under Title VII's explicit remedial provision, 42 U.S.C. § 2000e-5(g), it would be anomalous for the judiciary to authorize recovery of back pay or other types of monetary relief under Section 504.

Unlike 42 U.S.C. § 1983, which explicitly provides for private liability "in an action at law, suit in equity, or other proper proceeding for redress" and thus has been held to create "a species of tort liability," see *Carey v. Piphus*, 435 U.S. 247, 253 (1978), neither Title IX nor Section 504 does anything comparable, either explicitly or implicitly. The effects of the implication of a private right to bypass the administrative procedures under these statutes and sue a private university directly for injunctive or declaratory relief—as unwarranted as it would be to permit such litigation—nevertheless pale by comparison to the impact that implication of a monetary remedy would have on the financial resources of colleges, universities, and other entities that participate in one or more federally funded programs. The judicial restraint demonstrated in *City of Los Angeles v. Manhart*, — U.S. —, 98 S.Ct. 1370, 1380-83 (1978), in denying back pay liability in a Title VII sex dis-

crimination case because of the massive unanticipated burden this would impose on employers, even pursuant to a statute that explicitly authorized back pay awards in the discretion of the court, should apply much more strongly where the cause of action itself is being implied by the courts without explicit Congressional authorization. Thus, any implied right of action under Title IX or Section 504 should be limited to declaratory or injunctive relief.<sup>20</sup>

The Court, of course, will not necessarily reach the issues discussed in this section. Nonetheless, the decision to imply or not to imply a private right of action under a particular federal statute is primarily a matter of sound public policy (absent dispositive Congressional direction), and the policy issues under Title IX, Title VI, and Section 504 are so intertwined that the *Amicus* believes the Court should take full account of the size of the reservoir when it considers whether to open a sluice gate for this petitioner.

<sup>20</sup> Enforcement of Section 504 through private suits could impose massive cost burdens on employers and other recipients of federal funds. For example, the "reasonableness accommodation" provision of the Section 504 regulations, 45 C.F.R. § 84.12, which purports to apply to the employment practices of participants in federally funded programs, could entail large economic costs, unless construed by the courts to require no more than *de minimus* expenditures on behalf of handicapped individuals, cf. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). Likewise, private suits to require "affirmative conduct" (expenditures on behalf of handicapped individuals which are not made for nonhandicapped individuals) under Section 504, "even when such modifications become expensive," see *Davis v. Southeastern Community College*, 574 F.2d 1158, 1162 (4th Cir. 1978), could threaten the solvency of many colleges and universities.

***C. A claimant must exhaust administrative remedies before filing suit in federal court.***

It has long been established that no one can bring any kind of suit under Title VI, the model statute for Title IX and Section 504, without exhausting administrative remedies under 42 U.S.C. § 2000d-2. *Green Street Association v. Daley*, 373 F.2d 1, 8-9 (7th Cir.), cert. denied, 387 U.S. 932 (1967); *Cave v. Beame*, 433 F.Supp. 172, 174 (E.D.N.Y. 1977); *Johnson v. County of Chester*, 413 F.Supp. 1299, 1310-11 (E.D. Pa. 1976); *Green v. Cauthen*, 379 F.Supp. 361, 378 (D.S.C. 1974); *Feliciano v. Romney*, 363 F.Supp. 656, 672-73 (S.D.N.Y. 1973); *Dupree v. City of Chattanooga*, 362 F.Supp. 1136, 1141-42 (E.D. Tenn. 1973). The Title VI exhaustion requirement applies alike to alleged victims of discrimination, as in the cases above, and to alleged violators of the statute, as in *School Dist. of City of Saginaw, Michigan v. HEW*, 431 F.Supp. 147 (E.D. Mich. 1977).

Furthermore, a complainant must *fully* exhaust administrative remedies; it is not sufficient to allege, as Ms. Cannon has done in the present case, that she has filed a complaint with HEW. As this Court held in *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767-68 (1947):

The doctrine [of exhaustion of administrative remedies], wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention.

The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination, at least of those things which Congress intended to and could commit to such agencies for final decision. [note omitted]

More recently, in *McGee v. United States*, 402 U.S. 479, 484-85 (1971) (exhaustion requirement not satisfied), and *McKart v. United States*, 395 U.S. 185 (1969) (requirement satisfied), the policies underlying the doctrine were further explained. These policies were summarized in *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975):

Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an oppor-

tunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

This Court always applies the doctrine "with a regard for the particular administrative scheme at issue."<sup>30</sup> (*Id.*)

The statutory schemes for Title IX, Title VI, and Section 504 not only contain a "careful blend of administrative and judicial enforcement powers," see *Brown v. GSA*, *supra*, 425 U.S. at 832-33, but also take account, in the case of federally subsidized educational institutions, of the need for an initial determination by an agency with expertise in evaluating scholastic standards for a wide range of graduate school studies and in dealing with delicate issues of academic freedom. Hence, before judicial review can be undertaken, there must be a *final* agency determination about both the existence of discrimination and any necessary remedy.

The need for agency investigation and determinations is even more compelling in the new field of handicap discrimination under Section 504 of the Rehabilitation Act. As former HEW Secretary Matthews stressed, handicap discrimination is "far more complex" than the discrimination prohibited by Title VI and Title IX.<sup>31</sup> As the agency which has long

<sup>30</sup> The doctrine of exhaustion of remedies applies to constitutional as well as statutory civil rights claims. See, e.g., *Lance Roofing Co. v. Hodgson*, 343 F. Supp. 675 (N.D. Ga.) (3-judge court), *aff'd* 409 U.S. 1070 (1972); *Torres v. Taylor*, 47 U.S.L.W. 2147 (S.D.N.Y. 1978).

<sup>31</sup> 41 Fed. Reg. at 20,296; see Section II(B), *supra*.

been administering programs for the rehabilitation of handicapped individuals, HEW is better equipped than the federal courts to make the initial investigations of complex factual situations and to formulate a consistent approach to handicap discrimination problems. Thus, exhaustion of administrative remedies should be required under Section 504 as well, with judicial review limited to such questions as whether HEW exceeded its statutory authority or abused its discretion.

### III. Conclusion

This case presents a clear opportunity for the Court to reaffirm its commitment in *Cort* and *Amtrak* to leave major public policy decisions about the scope of federal jurisdiction to the wisdom of Congress. The Equal Employment Advisory Council therefore urges that the decisions of the trial court and the Court of Appeals be affirmed.

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## EXHIBIT A

Unsuccessful Attempts to Amend the Civil Rights Act of 1964  
to Add Handicap as a Prohibited Ground of Discrimination

## 93d Congress (1973-74)

Bill	Sponsor
S. 1780	Pell
H.R. 1120	Roybal
H.R. 2685	Hicks
H.R. 10960	Tiernan
H.R. 11986	Hicks & 24 others
H.R. 11987	Hicks & 10 others
H.R. 12654	O'Brien
H.R. 12916	Moakley
H.R. 13199	Hicks & 21 others
H.R. 13200	Hicks & 18 others

## 94th Congress (1975-76)

Bill	Sponsor
S. 1311	Pell
S. 1757	Weicker
H.R. 1346	O'Brien
H.R. 1886	Matsunaga
H.R. 2515	Hicks
H.R. 3497	Roybal
H.R. 4624	Hicks & 23 others
H.R. 4625	Hicks & 24 others
H.R. 4626	Hicks & 6 others
H.R. 5016	Hicks & 8 others
H.R. 7061	Dodd
H.R. 7754	Hicks & 3 others
H.R. 7758	Lehman
H.R. 7946	Dodd & 4 others
H.R. 8028	Beard & 19 others
H.R. 8417	Beard & 5 others
H.R. 12591	Koch

## 95th Congress (1977-78)

Bill	Sponsor
H.R. 264	Conte
H.R. 461	Le Fante
H.R. 1107	O'Brien
H.R. 1200	Rodino
H.R. 1995	Roybal
H.R. 3504	Edwards